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In The  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1948

No. 453

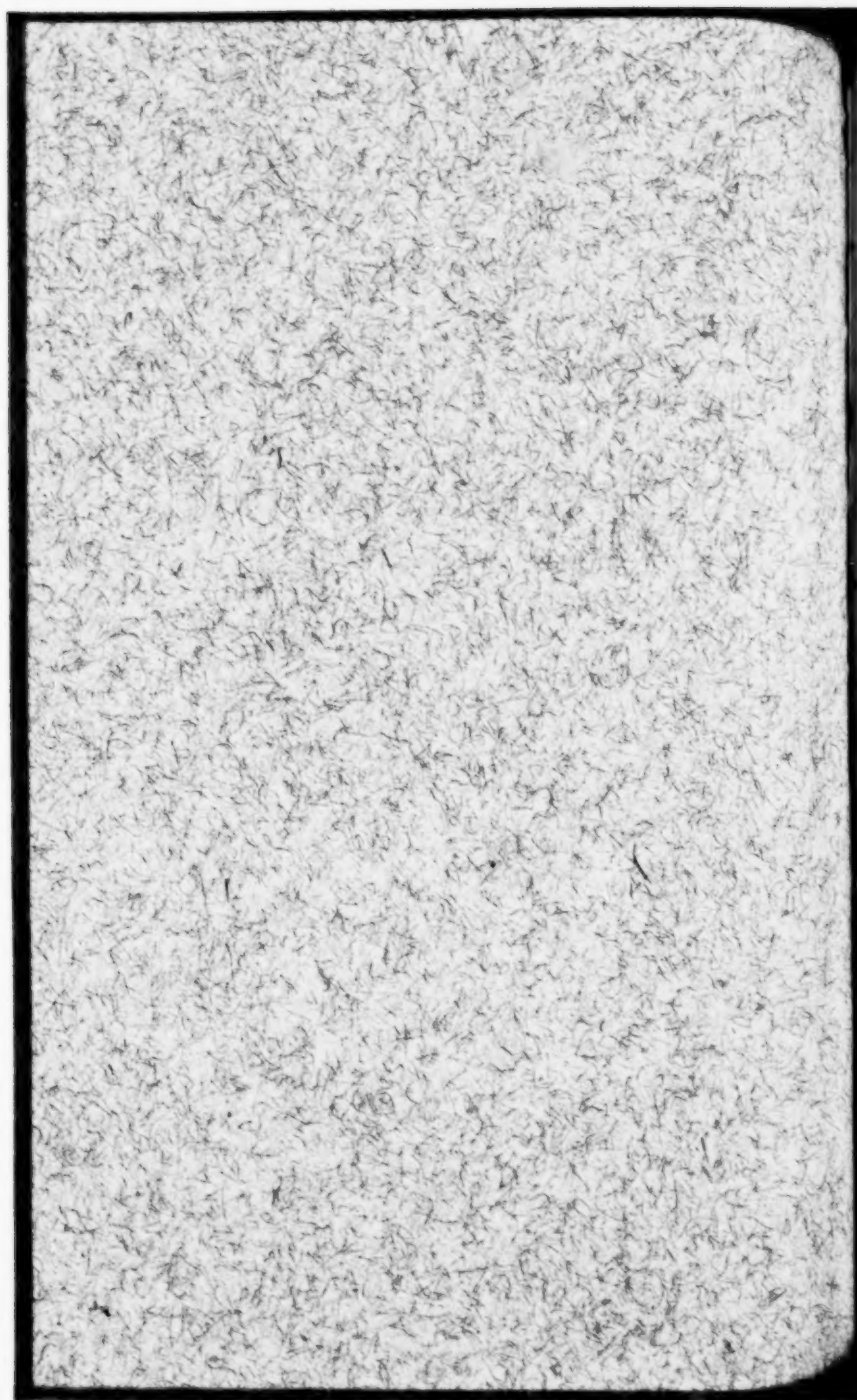
MORRISON T. WADE,  
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,  
Respondent.

**PETITION FOR REHEARING ON PETITION  
FOR WRIT OF CERTIORARI TO THE  
RECORDER'S COURT OF THE  
CITY OF DETROIT**

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Detroit 26, Michigan.



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Now comes MORRISON T. WADE, petitioner, and represents unto this Honorable Court as follows:

That he makes this petition in pursuance of Rule 33 of the Rules of the Supreme Court of the United States as amended, for a rehearing of his petition for a Writ of Certiorari.

That he believes that the denial by this Court of his application for Writ of Certiorari in the above entitled cause was based upon a misapprehension of the facts brought about by the erroneous impression created by the brief of the Solicitor General of the State of Michigan filed in the above entitled cause. That in his brief there appeared re-

peatedly the misstatements of fact, viz., that no Federal constitutional questions were raised in the lower court and that no constitutional questions were urged or argued and therefore were not passed upon by the lower court.

Petitioner further shows that the record clearly shows that Federal constitutional questions were raised. These Federal constitutional questions appear in the motion to dismiss (R. 18-19). They were argued, as appears by the Record, page 47, and the affidavit of the attorney for petitioner marked Exhibit A hereto attached and made a part hereof, and that part of the transcript relating to the argument of the Federal constitutional questions in the motion to dismiss, which is marked Exhibit B hereto attached and made a part hereof. The trial court did not grant the motion to dismiss, and proceeded to hear testimony on the question of lack of proper service claimed by the petitioner.

Petitioner further says that counsel for petitioner did raise, urge, and argue the Federal constitutional questions, as appears by the record (page 47), the affidavit of counsel, and the transcript, *supra*.

Petitioner further says that he has been informed that it is not the usual practice to include in the transcript of the record the argument of counsel on legal questions; that it is considered sufficient to make the statement that the legal questions were argued, which procedure was followed in the case at bar.

Your petitioner further shows that the record abundantly supports his contention that the proceeding of contempt against him was a violation of his constitutional rights in that it sought to deprive him of his liberty or property without due process of law and denied him the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution.

Petitioner further shows that practically all of the abuses complained of in the case of *In Re Oliver* were present in the instant case except the formality of going through what later proved to be an idle ceremony, the filing of a petition for an order to show cause and a so-called open hearing.

Petitioner further says that the transcript of what transpired in the secret hearing upon which the so-called contumacious behavior was predicated was not made available to petitioner.

Petitioner further shows that the Solicitor General sought to create, with evident success, the impression that the Federal constitution questions were not raised or argued in the lower court by repetitious misstatements to that effect.

Petitioner further shows that in view of the repeated erroneous assertions thus made, it would appear that this Court has been misled.

Petitioner further says that he believes that a gross miscarriage of justice will result unless this petition for a rehearing is granted and the Court is given an opportunity to pass upon the Federal constitutional questions raised.

WHEREFORE, petitioner prays that a rehearing of his petition for Writ of Certiorari be granted in order that the Federal constitutional questions properly before this Court may be considered upon the merits.

And your petitioner will ever pray.

MORRISON T. WADE,  
Petitioner,  
LARRY S. DAVIDOW and  
ANNE R. DAVIDOW,  
By LARRY S. DAVIDOW,  
Attorneys for Petitioner.

**CERTIFICATE**

LARRY S. DAVIDOW, attorney for the petitioner, MORRISON T. WADE, does hereby certify that the foregoing petition for rehearing is presented in good faith and is not made for the purpose of delay.

LARRY S. DAVIDOW

**EXHIBIT A**

LARRY S. DAVIDOW, being duly sworn, deposes and says that he is the attorney of record for the petitioner, MORRISON T. WADE, in the above entitled cause, and that he makes this affidavit in support of the petition for rehearing.

Deponent further says that he personally argued the motion to dismiss in the Recorder's Court for the City of Detroit, a copy of which motion is a part of the Record in this case; that this deponent not only raised, but discussed and argued the Federal constitutional questions described in paragraphs 1 and 2 of said motion (R. 18, 19), citing applicable law including the case of *In Re Richardson* decided by the New York Appellate Court, the opinion of which Court was written by Mr. Justice Cardozo; and that the Assistant Prosecuting Attorney for the County of Wayne argued in opposition to said motion.

Deponent further says that following the extensive argument made by this deponent and that of the Assistant Prosecuting Attorney for Wayne County in opposition thereto, before the Honorable Gerald W. Groat of the lower court, said Honorable Gerald W. Groat did not grant such

motion, but proceeded to take testimony on the matter of service, also raised in the motion to dismiss.

Deponent further says that the argument made by this deponent before the said Honorable Gerald W. Groat was stenographically transcribed, but was not made a part of the printed record because it never occurred to this deponent that the Attorney General or Solicitor General would state or reiterate any claims in conflict with the indisputable facts as disclosed by the record; that the Court calendar referred to in the Brief of the Solicitor General (p. 26) clearly discloses that the motion to dismiss was argued; that the transcript of what occurred the following day also discloses that the motion to dismiss had been argued and that specifically the Federal constitutional questions had been raised (R. 47).

Deponent further states that a reading of the Solicitor General's Brief indicates a studied effort to create the erroneous impression that the Federal constitutional questions had been neither raised nor argued in the lower court; that repeatedly there appear in the Solicitor General's Brief, statements pointing up the spurious claim that the Federal constitutional questions were neither raised, argued nor disposed of by the lower court (pp. 2, 4, 9, 12 and 15), whereas in fact and in truth the Federal constitutional questions had been raised and argued and adversely decided to the petitioner's rights by the lower court.

Deponent further says that the form of motion to dismiss filed in behalf of petitioner in the recorder's Court of the City of Detroit was in accordance with the rules and practice of said Recorder's Court.

Deponent further says that the Solicitor General who wrote the Brief was not present at the hearing on said mo-

tion to dismiss and therefore can not have any personal knowledge as to what transpired in the lower court, and that whatever the Solicitor General has said on this subject is based upon assumptions not supported by the Record or the facts.

Deponent further says that in the preparation of the record in the above entitled cause, deponent was familiar with the rule or practice concerning brevity in both the record and brief; that in accordance with such understanding, deponent was of opinion that the transcript of the oral argument made on the motion to dismiss before the lower court, in which Federal constitutional questions were raised, would not be desirable or deemed necessary by this Court; that this deponent believed that it was sufficient to state that these Federal constitutional questions had been raised, argued and disposed of in the lower court (R 1, 48); that this deponent did not anticipate that the established and indisputable fact that Federal constitutional questions had been so raised in a written motion and had been so orally argued in the lower court, would be disputed, let alone that allegations to the contrary would be made by the Solicitor General in his Brief.

And further deponent saith not.

LARRY S. DAVIDOW

Subscribed and sworn to before me  
this 10th day of March, A. D., 1949,  
NELL M. YORGEN,  
Notary Public, Wayne County, Michigan  
My commission expires December 9, 1949

## EXHIBIT B

STATE OF MICHIGAN—In the Recorder's Court for the  
City of Detroit

THE PEOPLE OF THE STATE OF  
MICHIGAN,

Plaintiff,

vs.

MORRISON T. WADE,

Defendant.

Miscellaneous

No. 49945

Proceedings had and testimony taken in the above entitled cause before Honorable Gerald W. Groat, Judge of the Recorder's Court, in the City of Detroit, Michigan, on June 9 and June 10, 1948.

Appearances: Mr. William P. Long, and Mr. Edwin W. Scott, Assistant Prosecuting Attorneys, appearing on behalf of the People. Mr. Larry S. Davidow, appearing on behalf of the defendant.

Burton E. Hawn, Reporter

The Clerk: Hearing on order to show cause in the matter of Morrison T. Wade.

The Court: Have you got the file?

Mr. Davidow: If Your Honor please, we have filed a motion to dismiss which will take considerable time to discuss. In the event of an adverse decision, we should like to have the opportunity of subpoenaing witnesses and making a showing—

The Court: We will arrive at that point right after we hear the motion.

Mr. Davidow: Very well, Your Honor.

Our motion, if Your Honor please, to dismiss this order to show cause states twenty specific reasons. The first reason is that the so-called One-man Grand Jury law, being Section 28.943 et sequi, of the Compiled Laws of the State of Michigan for 1929, is unconstitutional in that it violates the Fourteenth Amendment to the United States Constitution, which states, among other matters: "No person shall be deprived of his life, liberty or property without due process of law, and no person shall be denied the equal protection of the laws."

It is our position, Your Honor, that—perhaps I better couple that with the second reason, because they run together and being provisions of the United States Constitution which we are convinced are violated by the law under which this Court is now acting.

The second reason is, that it is in violation of Section 4 of Article 4 of the Constitution of the United States, guaranteeing a Republican form of government to all the states and the citizens thereof. I think that we have argued this matter in some measure, at least before Your Honor on an order to show cause involving Mr. Paul Westerkamp. That matter is now under, being held under advisement by Your Honor, and you have indicated that a decision will be forthcoming on the 16th of this month.

I am wondering as I stand here before the Court whether or not it might be well to have this discussion held in abeyance pending Your Honor's decision in that Westerkamp case, because very frankly, in the event that Your Honor decided adverse to us, it would obviate in any event, adverse or in our favor, it would obviate the necessity of arguing some of these questions which have already been raised before you, and the disposition of which, if favorable to Mr. Westerkamp, would certainly put an end to this

particular proceeding. I am just wondering what is Your Honor's reaction to that suggestion.

The Court: We will hear this matter this morning.

Mr. Davidow: Very well. I do not have with me, Your Honor, at the moment the decision of the United States Supreme Court in that Oliver case, but we think that is applicable to the case at bar on the question of the violation of the Fourteenth Amendment to the Constitution of the United States, on Section 40 of Article 4 of the Constitution. We would like to direct Your Honor's attention to the facts.

This so-called One-man Grand Jury Act—perhaps I may call Your Honor's attention to the fact that our motion was prepared originally before the consummation of the examination before Judge Maher in the case of the People vs. Morrison T. Wade. Our motion was finished and completed previous to the decision of Judge Maher, which was, I assume, predicated in some measure upon the brief filed by the Prosecuting Attorney, in which the Prosecuting Attorney insists that this hearing before Your Honor is not a One-man Grand Jury at all, insists it is a judicial inquiry. Now, I would like to direct Your Honor's attention to the fact that the original petition filed—I wonder whether we could have that file brought in here, Your Honor.

The Court: Certainly. Where is it?

Mr. Davidow: The original petition filed by the Attorney General and the Prosecuting Attorney.

The Court: We have it right here.

Mr. Davidow: The file, Your Honor, upon the face of it, it is entitled, "In the matter of the petition on behalf of the One-man Grand Jury," and the order below on file shows on February 3, 1948, one-man Grand Jury granted, Judge Gerald W. Groat to preside.

Now, the petition itself is entitled, "Petition for One-man Grand Jury." After making certain recitations, it recites a prayer for relief of three parts; the second one particularly to which I direct Your Honor's attention, reads as follows: "B. Wherefore your petitioners pray that the necessary procedure be taken to designate and appoint in accordance with the statutes and rules of court in such cases made and provided, one of this Court to conduct said One-Man Grand Jury inquiry and investigation pursuant to the statute in such case made and provided."

In the order, which I presume—if I am incorrect, I think Your Honor can very well correct me. In the order which I presumed was prepared by Mr. McNally and Mr. Black, we have this language and Your Honor signed it.

"James N. McNally,"—this is dated February of this year and the order is entered for granting a petition for a One-man Grand Jury. "James N. McNally, Prosecuting Attorney of Wayne County, and Eugene F. Black, Attorney General of the State of Michigan, having on the 3rd day of February, 1948, filed a petition in this court praying that a One-man Grand Jury investigation and inquiry be ordered and that one of the judges of this Court be designated to conduct such investigation for the reason set forth in said petition," and so on, and then comes the order of the Court following that recitation: "It is ordered that said petition for a One-man Grand Jury be and the same is hereby granted, and it is further ordered," and then Your Honor is designated as the Grand Juror or Grand Jury.

Now, I think Your Honor will take judicial notice of what occurred before Judge Maher. In the rush of coming here I did not bring with me the copy.

The Court: I couldn't take judicial notice of everything that happened before Judge Maher. I was there a few minutes.

Mr. Davidow: If Your Honor, please, will bear with me for a moment, I want to make that statement preliminary to that observation.

In that brief, and perhaps we can get that file here now, that will obviate any necessity on my part to rely on my recollection, in that brief filed by the Prosecuting Attorney, they denied that this was a Grand Jury proceeding, and Judge Maher evidently persuaded by that brief, similarly held that it is not a Grand Jury proceeding at all, so that Your Honor functions in the anomalous position where obviously the Prosecuting Attorney is blowing hot and cold depending upon the temperature he thinks is best suited for him for the purpose of persuading the Recorder's Court judges to initiate this inquiry. They describe it as a One-man Grand Jury and Your Honor led to believe that he is acting as a One-man Grand Jury, and then when we confront them with some obvious deficiencies which are fatal to what this so-called One-man Grand Jury has been doing, then they change their tune and say, "It is not a Grand Jury at all."

Mr. Long: That isn't what I said.

Mr. Davidow: You will have your chance to make your speech.

Mr. Long: You are playing with words and wasting time.

Mr. Davidow: I am not playing with words and wasting time.

The Court: Let us not have colloquy, let us proceed.

Mr. Davidow: I would like to, if I may.

Now, we contend, Your Honor, that a so-called judicial inquiry that is not in the nature of a Grand Jury is absolutely null and void so far as instituting this proceeding. Either this is a Grand Jury or it is not. If it is not, it has no validity of any kind whatsoever. If it is a Grand Jury,

then it is bound by certain minimum requirements that the law has set up, requirements which are unrecognized. Judge Maher, in his opinion, makes the observation, which is exactly the same as made by the Prosecuting Attorney in his brief. I read now, if Your Honor please, from page 4. There is some interesting observations that Judge Maher makes that Your Honor may find desirous of becoming familiar with later on, but this is the pertinent part to the argument I am making at this time.

On page 4, the last paragraph, Judge Maher's opinion reads as follows: "Great stress is laid on the fact that Judge Groat, the Grand Juror, did not take an oath to function as a Grand Juror, also that a Judge of the Recorder's Court cannot act as a Grand Jury citing Section 28.949 of Michigan Statutes Annotated (Section 17223 of C.L. of 1929) and *Jasnowski vs Connelly*, 197 Michigan, 257. Counsel confuses our sixteen to twenty-three man Grand Juries with our so-called one-man Grand Jury and the provisions of the respective acts creating said tribunals. The former can only be presided over by a Circuit Judge, it has county-wide jurisdiction, its members must take an oath (Section 28.949 of Michigan Statutes Annotated) and warrants and indictments issue after a true bill is voted. The one-man Grand Jury, which is provided for in Sections 28.943 and 28.944, Michigan Statutes Annotated, is a different body or instrument."

Here is the pertinent language. "It is not a Grand Jury at all, although so-called. It is a special statutory investigation by a judge or a justice. There are no provisions in said Act requiring the Grand Juror, whether he be Circuit Judge, Recorder's Court Judge, or Justice of the Peace, to take an oath separate and distinct from the one taken when said party qualifies as a judge at the beginning of his term," and so on.

The point I make, Your Honor, is that the Prosecuting Attorney, having been caught in a condition, a position from which there was no escape, if this were a Grand Jury, shifted his position altogether and denied that it is a Grand Jury. If this is not a Grand Jury, Your Honor, then the order made by this Court is utterly null and void. The petition is wholly without force and the whole proceeding is nugatory, invalid, a farce.

We come to the question of due process of law, Your Honor, which is protected under the Fourteenth Amendment to the Constitution of the United States, and I want to say this, if Your Honor please, and I want Your Honor to believe me in what I do say, nothing of any kind is intended as offensive to this Court for whom I entertain respect and opinion. The history of this country of ours necessarily involves the consideration of fundamental rights. It is something not to be talked about, not merely to school children on the fourth of July. It is something to be revered, read and respected, and honored, every day of our lives, and Your Honor well knows how the American colonies rebelled against the tyranny of Britain because, among other reasons, men were being denied the right to a fair trial in the vicinity where the alleged, rather, the offense was supposed to have been committed, taken three thousand miles across the hostile land away from their friends, their neighbors and counsel of their own choosing. In other words, if Your Honor please, the revolutionary forefathers realized that no matter what the good intentions might be, there were certain minimum requirements that had to be observed or else freedom would be no more, and that is the reason why the Fourteenth Amendment was subsequently adopted after an experience which brought about the Civil War, that no person could be deprived of his life, liberty or property without what the law calls due process of law,

and that seemingly means that insofar as criminal matters are concerned, there are various requirements leading to the arrest of a person which must be honored and observed.

In this State you can have a person arrested under one of two circumstances, either upon a complaint from which a warrant issues, or upon which a warrant issues, or an indictment upon which a warrant issues. This Court and no Court, and I do not speak disrespectfully when I say this, has the right to cause the arrest of any person without due process of law, and the issuance of an order to show cause in this case without the requirement of a Grand Jury being observed, namely, first, that the Grand Jury must be sworn, and, secondly, the case of a charge, that an indictment must be made or filed. True, we are confronted here only with an order to show cause, but I say, if Your Honor please, that this Court is without authority to issue an order to show cause for the reason that not sitting as a Grand Jury, the petition having been filed for a Grand Jury, the order having been signed for a Grand Jury, that this Court cannot function at all, because merely making a judicial inquiry does not create the power upon which an order to show cause may be issued. Either this is a one-man Grand Jury which is bound by the law applicable to grand juries, namely, that before a Grand Jury can begin its work it must be sworn, and this obviously has not been done here, or not being a Grand Jury, being merely a judicial inquiry. Then this Court has no power to cite for contempt. I do not want to labor the point that I argue before Your Honor before in the Westerkamp case, but I do want to briefly direct Your Honor's attention to what I consider to be the outstanding case that has to do with what I believe is a mistake, a tragic mistake, a mistake of which Your Honor has been a victim. It is a mistake which I think experience is showing is bad, namely, the attempt to place upon the shoulders of a judge the duties of an inquisitor. That has

never worked, it cannot work because the work of an inquisitor is altogether different than the work of a judge. This Court should be respected, this Court should be considered impartial and fair, no matter what the circumstances are, and this Court cannot labor in that atmosphere of fairness when it has been imposed upon in an attempt to act as an inquisitor with all of the evil influence that can flow from such an assignment. This Court is obliged to assume responsibility for acts that are done without the knowledge of this Court and which I am sure this Court would never lend himself to if brought to his attention.

I want to read again, if Your Honor please, these words of Justice Cardozo in which, in my opinion, it sets forth what the law is and which I think Your Honor should follow. There is a great deal more to life, Your Honor, than permitting one's self to be carried along the wave of what seems to be popularity. It is something about doing one's duty, and I am calling upon this Court to do his duty in a brave, resolute way, and I know that while the Michigan Supreme Court indicated that it was not persuaded by the logic and the reason and the law stated by Justice Cardozo in the *Slattery* case, yet what the Supreme Court of the United States did in the *Oliver* case might create the basis of suggesting that this Court in raising the issue properly can start a chain of circumstances that may persuade our Michigan Supreme Court to change its position likewise. As a matter of fact, Judge Maher, a colleague of yours, has said something which indicates that public opinion, as well as the opinion of lawyers and judges, is changing definitely on the question of the so-called one-man Grand Jury, because on page 3, this is what Judge Maher had to say in his opinion. I know it has no compelling effect upon Your Honor, but I think as one of your colleagues you are interested in what he said.

The Court: We respect our colleague, Mr. Davidow, and every other Judge in Michigan and also the United States Supreme Court.

Mr. Davidow: Yes, Your Honor. I think I fairly say that Your Honor is not obliged to follow the same legal opinion that one of your associates made. You may differ on different points. This is what Judge Maher said, on page 3. "Although there are many features as to practices and procedure, relative to the so-called one-man Grand Jury of Michigan which courts, bar associations, legislators and even portions of the general public may not favor or endorse, the law creating the same has yet to be declared unconstitutional." I say, Your Honor, it is significant that one of your colleagues should voluntarily and gratuitously state an opinion of that kind upon the official records of this Court which suggests, I believe, if Your Honor please, that the attitude by judges, by lawyers and by the public toward the one-man Grand Jury, so-called, is definitely changing and changing in a way adverse to the law.

Now, in that familiar Richardson case which, as Your Honor may recall, is reported in 247 New York 401; 160 N.E. 655, Justice Cardozo, speaking for what is the Supreme Court of New York, it being called the Appellate Court, said this, and I hope if you will, Your Honor, that these words will so fix themselves in your mind and heart that you will have no hesitancy in doing what I believe is your clear, probable duty. Justice Cardozo said this: "The function of the judge is to determine controversies between litigants \* \* \*. They are not adjuncts or advisers, much less investigating instruments of other agencies of government." \* \* \* "The statute,"—Justice Cardozo is describing the New York statute which is very similar to the one here,—"The statute was thus an encroachment upon the independence of judicial power even in the form in which it stood until recently

amended. Still more clearly is it such an encroachment in its form as now reframed. The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the District Attorney of the county, he would do no more and no less. What he learns is not committed to a record available to all the world. It is locked within his breast to be withheld or disclosed as his discretion shall determine. No doubt he is to act impartially, neither presenting from malice nor concealing from favor. One might say the same of any prosecutor. The outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to waken that tradition by any judgment of this Court."

A few more words, what I believe is a statement of the law which this Court can properly confirm and accept and state in his opinion. Justice Cardozo went on to say: "The policy at the root of the constitutional prohibition reinforces this conclusion."

Now, that is the provision compatible to ours in our State Constitution that I shall direct Your Honor's attention to in a moment.

"The policy is to conserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties. Some of these possibilities find significant illustration in the very cases before us now. Here is an inquiry which has already separated the respondent for more than two months from the discharge of his judicial duties, and which is likely to continue for many weeks to come."

Parenthetically, Your Honor, in this matter, and this is the nineteenth week, the fifth month, and when it will end we do not know. Whether Your Honor knows, I cannot say. Continuing: "The charges as first submitted involved a scrutiny of the acts of the accused official in multifarious transactions for fifteen years or more. Supplemental charges have now been filed with the result that the issues are more involved than ever."

Parenthetically, this was supposed to have started as an inquiry into three specific charitable organizations. The matter that brings us before Your Honor today involves two private corporations that have nothing to do with these so-called charitable organizations except that Mr. Morrison T. Wade, the Managing Director of the Society of Good Neighbors,—

The Court: Isn't that a misstatement, three charitable organizations?

Mr. Davidow: Your Honor is right, except that Mr. McNally, that same day, publicly stated—

The Court: Mr. McNally is not the Grand Jury.

Mr. Davidow: No, but, Your Honor, he is the attorney for the Grand Jury, and that is why I come back in the petition, he is acting as your attorney. I said before, Your Honor, that I regret that under the circumstances you are given credit and there is placed upon your shoulders the responsibility for what these people say and do involving the so-called Grand Jury. Mr. McNally said, in the public press, as quoted in the newspaper, and I can fetch them over if Your Honor is interested sufficiently in this respect. He said they were intended for three organizations, and he mentions the Society of Good Neighbors, the Northwest Council and the Redford Community War Memorial Association.

Mr. Long: There is no such thing in the newspapers, only three organizations. Mr. Davidow misspoke himself.

Mr. Davidow: Well, if Your Honor please, I stated what Mr. McNally said, and I will bring the papers over if Your Honor is interested, so I say, Your Honor, that Justice Cardozo anticipated and stated what had happened there. We are having the same happen here. I had come to where Justice Cardozo had said, "The great staff of counsel and assistants engaged upon the work is a token of its complexity and its probable duration." I don't know how much we have here, fifteen to twenty or more assistants to the Prosecuting Attorney, attaches and others engaged in this so-called Grand Jury work. Justice Cardozo continues to say, "Interference so prolonged with assignments to judicial duty is the very evil that was meant to be hit by the prohibitions of the Constitution directed against dual office. True indeed it is that there may be times when the duties of a Commissioner"—that is the judge when acting in New York as here as a Grand Juror—"—will be less onerous and protracted. Even so, the nature of the trust must be measured by its reasonable possibilities. Not what has been done under a statute, but what may reasonably be done under it, is the test of its validity."

He goes on to say, does Justice Cardozo, "From first to last, he has assumed to act as judge and nothing else. He has made his return and affidavits as a Justice of the Supreme Court."

The Supreme Court of New York, Your Honor, is like the Circuit Court in the State. It herein entails all that has been issued as a judge sitting as a one-man Grand Jury as a Judge of the Recorder's Court. You will note how applicable is the language of Justice Cardozo.

Continuing: "He has issued his notices and subpoenas with recitals that describe him as a Justice of the Supreme Court, and with the addition of his title as such Justice, he has signed his name thereto. We were informed by his coun-

sel that in case of need he will exercise the power to punish a contumacious witness for a contempt of his authority, though such power does not exist unless the subpoena has been issued by a Justice of the Court (Civil Practice Act, 406). Equivocal acts will be so interpreted as to escape a violation of the constitutional command, and even the risk of violation, when conduct, though permissible, is close to the line of danger. Here the acts are not equivocal. Nothing has been said and nothing has been done with the will to serve in any other capacity than that of a Justice of the Court."

And by their latest admission, the Prosecuting Attorney squirms from one position to another, depending on how the wind blows. If this is not a Grand Jury, if this is a judicial inquiry, then Your Honor is conducting something which he has no right under the recognized and established rules of law to carry on. The Michigan Constitution, Section 2 of Article 4, says this: "No person belonging to one department shall exercise the powers properly belonging to another, except in cases expressly provided in this Constitution," and there isn't a single line, a word or punctuation mark that confers upon the Judge of the Recorder's Court the power or the right to exercise the job of inquisitor, of inquirer, of investigation, whatever name you wish to give it. It is not a judicial function, Your Honor, and we have a decision of the Michigan Supreme Court involving this division of powers, and while this has to do with the activity of a governor, the fact still remains that Justice Cooley in his decision clearly indicated the appropriateness of this constitutional prohibition, and I want to take Your Honor's time to briefly direct your attention to it in the case of *Sutherland vs. Governor*, 29 Michigan 320, a case which is still the law of this State that has not been modified, that has not been reversed. They said—that was a case in which

the Court was asked to compel the governor to perform a ministerial action. Justice Cooley, speaking for the Supreme Court, said this: "However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons. Moreover, it is not customary in our Republican government to confer upon the governor duties merely ministerial, and in the performance of which he is to be left to no discretion whatever."

Justice Cooley goes on to say: "And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their power alike limited and defined by the Constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all three governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties.

"The Legislature, in prescribing rules for the courts, is acting within its proper province in making laws, while the courts in declining to enforce an unconstitutional law, are in like manner acting within their proper province, because they are only applying that which is law to the controversies in which they are called upon to give judgment. It is mainly by means of these checks and balances that the officers of

the several departments are kept within their jurisdiction, and if they are disregarded in any case, and power is usurped or abused, the remedy is by impeachment and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the Constitution is its equal."

Now, I say, Your Honor, no matter which way you looked at it, an inquiry, an investigation, an inquisition is not a function of the Court. That is for a Prosecuting Attorney or someone of comparable position. It is the executive branch of the government and therefore when the attempt is made to place upon Your Honor's shoulders the job of an inquisitor, it is definitely and completely in violation of the law and without any legal sanctity or justification and in conflict, necessarily, with both the Constitution of the State of Michigan and the Constitution of the United States as I have indicated.

